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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 884

LYLE E. REILEY, GEORGE A. FREIBERT, FRED J. BAUER, ET AL.,

Petitioners,

vs.

HARRY A. MILLIS, INDIVIDUALLY AND AS CHAIRMAN OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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HARRY A. MILLIS, INDIVIDUALLY AND AS CHAIRMAN OF THE NATIONAL LABOR RELATIONS BOARD; GERARD D. REILLY, INDIVIDUALLY AND AS A MEMBER OF THE NATIONAL LABOR RELATIONS BOARD; JOHN M. HOUSTON, INDIVIDUALLY AND AS A MEMBER OF THE NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Justices of the Supreme Court of the United States:

The above named petitioners respectfully petition for a Writ of Certiorari to review judgment of the United States

Court of Appeals for the District of Columbia, rendered on July 10, 1944 (R. 45). Said judgment affirmed an order of the United States District Court for the District of Columbia denying petitioners' motion for a preliminary injunction and dismissing petitioners' complaint (R. 41). The case came before the Court of Appeals on petitioners' appeal from said order of the District Court (R. 42).

Opinions Below

The District Court for the District of Columbia, Honorable Edward C. Eicher, Chief Justice, held that it had jurisdiction of petitioners' complaint in which they asked for a mandatory injunction to set aside and expunge from the records of the National Labor Relations Board a direction of election and certification of a collective bargaining representative for a group of employees which included petitioners. The court dismissed the complaint upon the ground that the complaint did not show that the National Labor Relations Board had acted arbitrarily and capriciously or beyond its jurisdiction.

The District Court's opinion is reported in 52 F. Supp. 172. It is also set forth in the record at pages 39-40.

The Court of Appeals affirmed the judgment of the District Court upon the ground that petitioners had made no showing of any special circumstances which made the review provided by the National Labor Relations Act an inadequate remedy for the matters set out in the complaint.

The opinion of the Court of Appeals is reported in 144 F. 2d 259. It is also set forth in the record at page 44.

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia was entered July 10, 1944 (R. 45). A petition for rehearing duly filed by the petitioners was denied on

September 23, 1944 (R. 46). On December 2, 1944, Chief Justice Stone of this Court signed an order extending until February 1, 1945, the time within which your petitioners might file this, their petition for certiorari.

Petitioners base their action upon the original jurisdiction conferred upon federal courts of controversies arising under the Constitution and laws of the United States (Judicial Code, 24 (1); 28 U. S. C. A. 41 (1)), over "all suits and proceedings arising under under any law regulating commerce" (Judicial Code, 24 (8); 28 U. S. C. A. Section 41 (8)), and upon the jurisdiction with which courts of the United States are vested under Article III, Section 2 of the Constitution.

The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code (28 U. S. C. A. Section 347 (a)), and Supreme Court Rule 38, Pars. 5 (b) and 5 (c).

Statutes Involved

The statute involved is the National Labor Relations Act, 29 U. S. C. A. 151, *et seq.*, especially 29 U. S. C. A. Secs. 152 (6), 152 (7) and 159 (c).

The pertinent provisions of these sections are short and are quoted in full at the appropriate place in the brief filed in support of this petition.

Statement of Facts and Matters Involved in This Petition

This is a suit instituted by the petitioners for equitable relief by way of a mandatory injunction from acts of the National Labor Relations Board alleged to be arbitrary and capricious, unsupported by the evidence, contrary to the evidence and beyond the power and jurisdiction of the Board and in plain contravention of the National Labor Relations Act (hereinafter sometimes referred to as the

"Act") and of the Constitution of the United States and particularly the Fifth Amendment thereto.

The complaint, filed by petitioners and naming the Chairman and the members of the National Labor Relations Board individually and in their official capacities, as defendants, alleges the following facts:

Plaintiffs (petitioners), twenty in number, are employed by the City National Bank and Trust Company of Chicago (hereinafter called the "Bank") as a part of its protective force. The Bank is a national banking corporation, chartered under the National Banking Act, and engages in general banking activities (R. 3).

The City National Safe Deposit Company (hereinafter called the "Safe Deposit Company") is an Illinois corporation engaged in the business of renting deposit space to the public, is a wholly-owned subsidiary and paying tenant of the Bank, and occupies premises within the physical confines of the Bank's building (R. 4).

The protective force of the Bank consists of 35 armed guards, comprising three groups, namely, police guards, messenger guards and night watchmen. The duties of the police guards consist of guarding the premises and directing customers seeking information. The messenger guards are plain clothes men who accompany and protect messengers traveling from the Bank to other banks or business houses in the City of Chicago. The night watchmen protect the premises of the Bank at night. All the protection force is under the immediate supervision of the chief of the day police of the Bank (R. 4).

The Safe Deposit Company employs three armed guards and five vault attendants, deputized to carry arms. Their duties consist of guarding the premises of the Safe Deposit Company, issuing, receiving and checking access slips from safe deposit box lessees and withdrawing and replacing

boxes for lessees. They are under the immediate supervision of the manager of the Safe Deposit Company (R. 5).

On March 26, 1943, Protective Service Employees' Union of Chicago, Local 240, affiliated with Building Service Employees' International Union (A. F. of L.), a labor organization (hereinafter called the "Union"), filed with the Regional Director of the Board for the Thirteenth Region (Chicago, Illinois) a petition alleging that a question affecting commerce had arisen concerning representation of certain of the employees of the Bank and of the Safe Deposit Company and requesting an investigation and certification of representatives pursuant to Section 9 (c) of the National Labor Relations Act. This petition related to said 35 protection employees of the Bank and said eight armed guards and vault attendants of the Safe Deposit Company and described them as together constituting an appropriate bargaining unit (R. 5).

After a hearing at which the Bank and Safe Deposit Company offered evidence in opposition to the petition, the Board made a decision and direction of election in which it found that the Bank and Safe Deposit Company might be considered as a single integrated enterprise, that they were engaged in commerce, that their operations affected commerce within the meaning of the National Labor Relations Act, and that said protective force of the Bank and said armed guards and vault attendants of the Safe Deposit Company constituted a proper bargaining unit. The decision and direction ordered that an election be held among said employees of the two companies to ascertain their representative for the purpose of collective bargaining (R. 6-7).

On July 10, 1943, an election was held among said employees. The Regional Director of the Board thereafter certified that 23 unchallenged ballots were cast in favor of,

and 17 against, the Union. Objections were filed by the Bank and Safe Deposit Company to the conduct of the election, to the jurisdiction of the Board and to the appropriateness of the unit. Said objections were overruled and the Board, by a supplemental decision and certification of representatives, certified that the Union had been designated and selected by a majority of all the members of the protection force employed by the Bank and of the armed guards and vault attendants employed by the Safe Deposit Company as their exclusive representative for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment (R. 7-8).

Thirty-five of the Bank's protection force voted at said election, 15 in favor of, and 20 against, the Union. But for the inclusion in the unit of the 8 employees of the Safe Deposit Company a majority of the votes cast would have been against the Union. At the time of said election and at the present time, it is the desire of a majority of the protection employees of the Bank that they not be represented by the Union for the purpose of collective bargaining. None of the plaintiffs (petitioners) was a party to or had any notice of or opportunity to be heard in said proceedings before the Board (R. 9).

The complaint further alleges that petitioners severally have a right to bargain with their employer with respect to rates of pay, wages, hours of employment and other conditions of employment, which right is a property right of great value, and that they have a right to select representatives for the purpose of collective bargaining, etc., and that said right is also a property right of great value (R. 9).

The complaint charges that the said decision and direction of election and supplemental decision and certification

of representatives are beyond the power of the Board and in contravention of the Act and of the Fifth Amendment to the Constitution of the United States and are invalid, null and void in that neither the Bank nor the Safe Deposit Company is engaged in commerce or in any activity affecting commerce, but each is engaged in purely local and intrastate activity limited to the territory and confines of the City of Chicago and that no business of either corporation has any direct, immediate, close or substantial effect upon interstate commerce; that the protection force of the Bank is not engaged in commerce or in any activity affecting commerce, but is engaged solely in protecting the physical premises and contents thereof belonging to the Bank in Chicago and the customers and employees making use of and going to and from said premises, and that no part of their activity extends beyond the confines of the City of Chicago or affects interstate commerce in any direct, immediate, close or substantial manner; that the armed guards and vault attendants of the Safe Deposit Company are not engaged in commerce or in activities affecting commerce; that their activity is confined to the premises of the Safe Deposit Company in Chicago and that they are engaged solely in protecting said premises and in making available to customers the deposit boxes maintained in the vault of the Safe Deposit Company in Chicago (R. 9-10).

The complaint further charges that said decision and direction of election and supplemental decision and certification of representatives are erroneous and invalid for the further reasons that the findings of the Board namely: (1) that the Bank and Safe Deposit Company may be considered as a single integrated enterprise and that they are engaged in commerce and their operations affect commerce within the meaning of the Act, (2) that a question affecting commerce has arisen concerning the representa-

tion of the employees within the meaning of the Act, and (3), that all the members of the protective force of the Bank and the armed guards and vault attendants of the Safe Deposit Company constitute a unit for the purpose of collective bargaining, are unsupported by evidence and contrary to the evidence (R. 11).

It is further charged that the decision of the Board that the employees of the Safe Deposit Company should be joined in a collective bargaining unit with the protection employees of the Bank was and is arbitrary and capricious (R. 11).

It is further charged that unless said decision and direction of election and said supplemental decision and certification of representatives are declared null and void or vacated and set aside the petitioners will be unlawfully deprived of their right to bargain with their employer with respect to rates of pay, wages, hours of employment and other conditions of employment and of their right to select representatives for the purpose of collective bargaining with respect to said subjects; that the value of such rights cannot be measured by any certain pecuniary standard and that an action at law for damages resulting to petitioners because of the unlawful taking and destruction of said rights would be inappropriate and wholly inadequate (R. 11-12).

It is also alleged that the Act contains no provision by which the petitioners may obtain a review of said decision and direction of election or said supplemental decision and certification of representatives and that petitioners have no way of preventing the aforesaid unlawful taking of their property rights or of obtaining redress therefor except in a court of equity (R. 12).

The complaint prays that said decision and direction of election and said supplemental decision and certification of representatives be declared null and void and that a

mandatory injunction be granted restraining and enjoining the defendants from permitting said decision and direction of election and said supplemental decision and certification of representatives to remain upon the records of the Board, and directing the defendants to vacate, set aside and expunge the same from the records of the Board (R. 12-13).

The petitioners filed a motion for a preliminary injunction (R. 28) and two supporting affidavits. From these affidavits it appears that the Bank had declined to bargain with the Union and that the United States Conciliation Service had certified the dispute between the Bank and the Union to the National War Labor Board (R. 34-36).

The District Court denied the motion for a preliminary injunction and sustained a motion of the defendants to dismiss the complaint.

The District Court held that it had jurisdiction to grant the relief sought by the petitioners, but stated that the record disclosed that the Board had sufficient evidence to warrant including the employees of the Bank and Safe Deposit Company in one unit and to warrant its holding that the Bank was engaged in commerce (R. 39-40). Since neither the evidence introduced before the Board nor any other evidence was before the District Court, the holding of the court can only be taken to mean that on the allegations of the complaint the action of the Board was justified. However, the complaint specifically alleges that the findings of the Board, (1) that the employees of the Bank and Safe Deposit Company constitute a unit for the purpose of collective bargaining, and (2) that the Bank and the Safe Deposit Company are engaged in commerce, are unsupported by evidence and contrary to the evidence. Under well recognized rules of pleadings these allegations of the complaint are allegations of fact admitted to be true for the purpose of a motion to dismiss the complaint (*Chicago Junction*

Case, 264 U. S. 258, 262). The action of the District Court dismissing the complaint on the merits was therefore wholly unjustified and violated elementary principles of the law of pleading.

The Court of Appeals, on the contrary, did not purport to pass upon the validity of the Board's action. It held that the National Labor Relations Act did not provide for a review of a certification of representatives by the Board, unless such certification was followed by an order of the Board. It further held that the petitioners had made no showing of any special circumstances which made the review provided by the act an inadequate remedy for the matters set out in the complaint, and affirmed the judgment of the District Court dismissing the complaint. The judgment of the Court of Appeals is based upon the assumption that the petitioners are afforded a remedy under the Act, whereas the Act affords absolutely no remedy for employees in the position of petitioners. The effect of the judgment of the Court of Appeals is to deny to petitioners any relief from action of the Board alleged to be arbitrary and capricious and in excess of the Board's jurisdiction and in violation of their fundamental rights protected by constitutional guaranties.

Your petitioners now seek a review and reversal of that judgment by this Honorable Court.

Questions Presented

The fundamental question presented by this petition is, will the courts of the United States protect the basic rights of citizens from the arbitrary, unauthorized and unconstitutional action of an administrative board?

Preliminary to this fundamental question are the following questions:

1. Does the complaint allege facts which, if proven, will establish that either the protective force of the Bank, the

vault attendants of the Safe Deposit Company or the Safe Deposit Company are not engaged in commerce or operations that affect commerce within the meaning of the National Labor Relations Act?

2. Does the complaint allege facts which, if proven, will establish that the Board acted arbitrarily and capriciously, or without any support in the evidence, in holding that the protective force of the Bank and the vault attendants of the Safe Deposit Company constitute an appropriate unit for the purposes of collective bargaining?

3. Does the certification of the bargaining representative by the Board deprive or threaten to deprive the petitioners of their right to bargain with their employer with respect to rates of pay, wages, hours of employment and other conditions of employment and of their right to select representatives for the purpose of collective bargaining with respect to said subjects?

4. Are such bargaining rights of the petitioners protected by the Constitution of the United States and particularly by the Fifth Amendment thereto?

5. Are the petitioners afforded any remedy under the National Labor Relations Act from the deprivation or threatened deprivation of those rights resulting from the certification of a bargaining representative by the Board?

If, of the preliminary questions, either 1 or 2, together with 3 and 4 are answered in the affirmative and 5 in the negative, then this petition presents the all-important question of whether the courts of the United States are to continue to perform one of their great historic functions, namely, the protection of the rights of citizens guaranteed

by the Constitution from arbitrary, unauthorized and unconstitutional administrative action.

Reasons for Granting the Writ

1. *The decision below is contrary to the uniform line of decisions of this Court.*

This Court has uniformly held that the courts of the United States will exercise their jurisdiction to protect the constitutional rights of citizens when those rights are infringed or invaded by unauthorized governmental action. The Court of Appeals for the District of Columbia in affirming the judgment dismissing petitioners' complaint on the assumption that the petitioners are afforded a remedy by procedure authorized under the National Labor Relations Act, when no such remedy exists, has denied petitioners a resort to the courts of the United States for the protection of their constitutional rights.

2. *The decision below permits an administrative agency to enlarge its own jurisdiction contrary to limitations imposed by Congress.*

If either the protective force employees of the Bank, the vault attendants of the Safe Deposit Company or the Safe Deposit Company are not engaged in interstate commerce within the meaning of the act, the decisions and certification of the Board represents an attempted exercise of authority beyond the Board's jurisdiction which vitally affects petitioners. The decision below precludes any judicial review of the question of the Board's jurisdiction, leaves the Board to act in its own uncontrolled discretion, and makes it the final judge of its own jurisdiction, a power which Congress has not attempted to and could not lawfully confer upon the Board under the Constitution.

3. *The question of the right of courts of the United States to review by an independent suit in equity the validity of a certification of a bargaining representative by the Natioinal Labor Relatons Board has not been, but should be, settled by this Court.*

In *American Federation of Labor* v. *National Labor Relations Board,* 308 U. S. 401, the Court in referring to this question said (p. 412):

> "* * * It can be appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy. This question can be properly and adequately considered only when it is brought to us for review upon a suitable record."

A number of district courts have taken jurisdiction of similar actions involving representative proceedings of the Board. *American Federation of Labor, et al.* v. *Madden, et al.* (U. S. D. C., D. C., 1940), 33 F. Supp. 943; *International Brotherhood of Electrical Workers, et al.* v. *N. L. R. B.* (D. C., Mich., 1940), 41 Supp. 57; *Klein* v. *Herrick* (D. C., S. D. N. Y., 1941), 41 F. Supp. 417. In *Inland Empire District Council, Lumber and Saw Mill Workers' Union, et al.* v. *Thomas P. Graham, Jr., et al.* (U. S. D. C., W. D. Wash., 1943), 53 F. Supp. 369, the court expressed the opinion it would have jurisdiction in a proper suit, although it dismissed the action as premature.

The frequent recurrence of this important question indicates a definite need for its final decision by this Court.

Prayer

Wherefore petitioners pray for a Writ of Certiorari to issue from this Honorable Court reviewing the judgment of the United States Court of Appeals for the District of

Columbia entered in this cause on July 10, 1944, to the end that the judgment of that court be reversed by this Honorable Court and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem lawful and just.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinion of the Court

The Opinion of the United States Court of Appeals, rendered July 10, 1944, is printed in the record hereof at R. 44.

Jurisdiction

A statement of the jurisdiction of this Court is set forth in the foregoing Petition for Writ of Certiorari.

Statement of the Case

The foregoing Petition for Writ of Certiorari contains a concise statement of the case which, for reasons of brevity, will not be repeated here.

Specification of Errors

1. The Court of Appeals for the District of Columbia erred in holding that petitioners made no showing of any special circumstances which made the review provided by statute an inadequate remedy for the matters set out in their complaint.

2. The Court of Appeals for the District of Columbia erred in affirming the judgment of the District Court dismissing the complaint.

3. The Court of Appeals for the District of Columbia erred in affirming the judgment of the District Court denying petitioners' motion for a preliminary injunction.

ARGUMENT

The argument will first discuss, in the order of their statement in the foregoing Petition for Writ of Certiorari, the questions preliminary to the fundamental question presented by the petition.

I

The complaint alleges facts which, if proven, would establish that neither the protective force of the bank, the vault attendants of the Safe Deposit Company, nor the Safe Deposit Company are engaged in interstate commerce or operations that affect such commerce within the meaning of the National Labor Relations Act.

As set forth in the complaint, the Board made the following findings:

> "1. We find that the Bank and the Safe Deposit Company are engaged in commerce and their operations affect commerce within the meaning of the National Labor Relations Act."
>
> "2. We find that a question affecting commerce has arisen concerning the representation of employees of the Company, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act." (R. 11.)

The complaint alleges that these findings are "unsupported by evidence and contrary to the evidence" (R. 11).

The allegation that a finding is unsupported by evidence is an allegation of fact which, upon a motion to dismiss the complaint, must be taken as true.

In the *Chicago Junction Case*, 264 U. S. 258, this Court, speaking through Mr. Justice Brandeis, said (P. 262):

> "Plaintiffs contend that the order is void because there was no evidence to support the finding that the acquisition of control of the terminal railroads by the New York Central 'will be in the public interest.' The bill charges, in clear and definite terms, that this finding was wholly unsupported by evidence. We must take that fact as admitted for the purposes of this appeal. The allegation is made as one of fact."

The rule is thus stated by Vom Baur in his *Federal Administrative Law*, Volume 2, page 703:

> "That there was not substantial evidence to support an administrative finding must be taken as a fact from an appropriate allegation in a complaint upon a motion to dismiss directed to the face of the complaint. * * *"

The complaint further alleges that the decision and direction of election and supplemental decision and certification of representatives were and each is beyond the power of the Board and in contravention of the National Labor Relations Act and of the Fifth Amendment to the Constitution of the United States, and is invalid, null and void, in that neither the Bank nor the Safe Deposit Company nor the protective force of the Bank, including petitioners, nor the vault attendants of the Safe Deposit Company are engaged in commerce or in activities affecting commerce (R. 9-10). The complaint further sets forth in detail the nature of the respective businesses conducted by the Bank and the Safe Deposit Company (R. 3-5), and the nature of the duties performed by the protection force of the Bank and the vault attendants of the Safe Deposit Company (R. 4-5, 10).

Unless from the statements of fact in the complaint relative to the business conducted by the Safe Deposit Company and the duties performed by the protection force of the Bank, and the vault attendants of the Safe Deposit Company, it can be said that the protection force of the Bank, the Safe Deposit Company and the vault attendants of the Safe Deposit Company are each engaged in commerce or in activities affecting commerce within the meaning of the National Labor Relations Act, the conclusion is inescapable that the complaint alleges facts which, if proven, establish that the Board acted beyond its jurisdiction in making the decisions and certifications complained of.

(A)

The Allegations of the Complaint Relative to the Duties of the Protection Force of the Bank do not Show that the Members thereof Are Engaged in Commerce or in Activities Affecting Commerce Within the Meaning of the National Labor Relations Act.

Clause 3 of Section 8 of Article I of the Constitution of the United States provides that Congress shall have the power to "regulate commerce with foreign nations and among the several states." It is to this clause of the Constitution that the power of Congress to enact the National Labor Relations Act must be referred.

Section 9 (c) of the Act provides in part:

> "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. * * *"

Section 2 (6) of the Act provides:

> "The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, * * *."

Section 2 (7) provides:

> "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

Under the statute, before the Board has any purported authority to investigate a controversy concerning representation of employees and to certify the representative, the controversy must be one in interstate commerce, or

must buden or obstruct interstate commerce or its free flow, or must have led to or have a tendency to lead to a labor dispute burdening or obstructing interstate commerce or its free flow.

In one sense of the word it is practically impossible to conceive of any activity that does not theoretically have some effect on interstate commerce. But such remote and theoretical effects are not within the regulatory power of Congress. To take the view that anything affecting interstate commerce, however remote the effect may be, is within the regulatory power of Congress is, as Mr. Justice Roberts said in *Warren-Bradshaw Co.* v. *Hall*, 317 U. S. 88 (p. 94):

> "* * * to ignore all practical distinction between what is parochial and what is national. It is but the application to the practical affairs of life of a philosophic and impractical test. It is but to repeat, in another form, the old story of the pebble thrown into the pool, and the theoretically infinite extent of the resulting waves, albeit too tiny to be seen or felt by the exercise of one's sense."

This Court has said more than once that activities which are intrastate when separately considered must have a close and substantial relation to interstate commerce before they come within the scope of federal regulative power. Thus in *Santa Cruz Co.* v. *Labor Board*, 303 U. S. 453, the majority of the Court, speaking through Chief Justice Hughes, said (p. 466):

> "It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, *it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection.* However difficult in application, *this principle is essential to the maintenance of our constitutional system.* The subject of federal power is still 'commerce' and not all commerce but commerce with foreign

nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. *Schecter Corporation v. United States*, 295 U. S. 495, 546. 'Activities local in their immediacy do not become interstate and national because of distant repercussions.' *Id.*, p. 554." (Italics ours.)

In *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, the majority of the Court, again speaking through Chief Justice Hughes, said (p. 30):

> "* * * The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. *That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.*" (Italics ours.)

and at page 37:

> "* * * Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. *Schecter Corp.* v. *United States*, *supra*. Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. *Id.* The question is necessarily one of degree. * * *"

Thus, as stated by this Court, before the Board has any authority to investigate a controversy concerning repre-

sentation, etc., the controversy must be one which burdens or obstructs or tends to burden or to obstruct interstate commerce in a direct and substantial manner.

As stated in the bill of complaint, the protection force of the Bank consists of 35 armed guards, who are divided into three groups, namely, police guards, messenger guards and night watchmen. The duties of the police guards consist of guarding the premises and directing customers seeking information. The messenger guards accompany and protect messengers traveling from the Bank to other banks or business houses in the City of Chicago. The night watchmen protect the premises of the Bank at night, turn off lights and watch for fires (R. 4-5). Obviously, all of said protection force are engaged in local police activity in the City of Chicago, which is purely an intrastate activity.

When we consider that the Bank might and that some banks do leave such activities to the local municipal authorities, it becomes apparent that the activities of the protection force can have no such close and substantial effect upon interstate commerce as to bring them within the regulatory power of Congress.

Courts always presume that public officials will perform their duties. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 357; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 190, 31 C. J. S. 798. Should the Bank dispense with its protection force, or for any reason be without its service, it must be assumed that the local police officials would perform their duties and afford the Bank whatever police protection might be necessary to enable it to perform its normal business functions. Hence there is no ground for the assumption that a labor dispute involving the Bank's protection force would in the remotest degree affect interstate commerce.

The District Court below cited the case of *National Labor Relations Board* v. *Bank of America, etc.*, 130 F. (2d) 624,

as authority for the statement that the Bank in the instant case is engaged in commerce, and apparently assumed that if the Bank is engaged in commerce the jurisdiction of the Board in the instant case is established. If it be assumed that some of the Bank's activities constitute commerce, or directly and substantially affect commerce, such assumption does not dispose of the question of the Board's jurisdiction in the instant case. In the *Bank of America case*, the employees involved were the great bulk of the rank and file of the employees engaged in the commercial activities of the bank, and through whom such activities of the bank as the court found constituted commerce between the states, or directly and substantially affected that commerce, were performed. That case is in no way an authority in the instant case.

Before the Board has any authority to investigate a controversy concerning representation, etc., the controversy must be one which burdens or obstructs or tends to burden and obstruct insterstate commerce in a direct and substantial manner. The question is not whether the employer may or may not be engaged in interstate commerce in certain respects, but whether the particular controversy has or may have, a direct and substantial effect upon interstate commerce.

Thus in *National Labor Relations Bd.* v. *Santa Cruz Fruit P. Co.*, 91 F. (2d) 790 (C. C. A., 9th Cir.), affirmed in *Santa Cruz Co.* v. *Labor Board*, 303 U. S. 453, the Board had entered orders for the Fruit Company to cease and desist from certain violations of the National Labor Relations Act applicable to two packing plants of the company, one of which plants shipped large quantities of its products in interstate commerce, and one of which made no shipments in interstate commerce. The Court held that it would not enforce the order with respect to the plant

making no shipments in interstate commerce. The effect on interstate commerce of the labor dispute at such plant was too remote to be subject to congressional control.

(B)

The Allegations of the Complaint Relative to the Business of the Safe Deposit Company and the Duties of its Vault Attendants do not Show that Either the Safe Deposit Company or its Vault Attendants are Engaged in Commerce or in Activities affecting Commerce Within the Meaning of the National Labor Relations Act.

As alleged in the bill of complaint, the Safe Deposit Company is engaged in the business of renting safe deposit space to the public. Of a total of 15 Safe Deposit Company employees, 8 were involved in the proceedings before the Board, namely, 3 armed guards and 5 vault attendants, whose duties consist, respectively, of guarding the premises, and issuing, receiving and checking access slips from safe deposit lessees who require admission to the vaults, and of withdrawing and replacing boxes for lessees (R. 4-5). The Company and its employees are simply engaged in renting space where customers may deposit property for safekeeping. The Company's relations to its customers is not even that of a warehouseman since it does not have immediate control of the property stored, but only of the receptacles in which the property is stored.

The Safe Deposit Company does not either pick up or deliver goods to its vaults, or have control of them in its vaults. It simply rents space where customers may store their valuables for safekeeping and guards the receptacles wherein the goods are stored.

Certainly property stored in a receptacle in a vault for safekeeping is not property moving in commerce. The Safe Deposit Company has no right or authority to ship any of the property so stored in interstate commerce.

If this strictly local activity of storing property in a safety vault for indefinite safe keeping closely and directly affects interstate commerce, then it is practically impossible to conceive of any activity that does not so affect such commerce.

If there is to be any field left for the practical application of the doctrine repeatedly announced by this Court "that the distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system," then activities such as are engaged in by the Safe Deposit Company and its vault attendants must be held to be beyond the scope of the National Labor Relations Act and the regulatory power of Congres under the commerce clause of the Constitution. If our federal system is to survive other than in an unrealizable world of theory, and is to have any practical effect upon the lives of the individual citizens, there must be some field left for the exercise of the sovereign power of the state.

If, as we believe has been above demonstrated, on the allegations of the complaint, neither the protection force of the Bank nor the Safe Deposit Company, nor the vault attendants of the Safe Deposit Company, are engaged in commerce or in activities closely or substantially affecting commerce, then for the purposes of the petition in this case, it must be assumed the Board was without jurisdiction and that its decision and certification are null and void.

This is equally true if it be assumed that the protection force employees are subject to the jurisdiction of the Board, but not the Safe Deposit Company or its employees, for the Board, being without jurisdiction of the Safe Deposit Company employees, had no lawful right to include them in a bargaining unit with the protection force employees and the unit found is a void and unlawful unit, and hence

the certification of the Union as the representative of such unit is null and void.

II

The complaint alleges facts which, if proven, would establish that the National Labor Relations Board acted arbitrarily and capriciously in holding that the protection force of the bank and vault attendants of the Safe Deposit Company constitute an appropriate unit for the purposes of collective bargaining.

With reference to the appropriateness of the bargaining unit the Board, as alleged in the complaint, found

> "We find that all members of the day police, night force, and deputies employed by the Bank and the vault attendants employed by the Safe Deposit Company, * * * constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act" (R. 11).

In addition to alleging that said finding was arbitrary and capricious, the complaint alleges that it is "unsupported by evidence and contrary to the evidence" (R.11).

As above demonstrated, the allegation that said finding is unsupported by evidence and contrary to the evidence is an allegation of fact, admitted to be true upon a motion to dismiss the complaint.

An administrative finding or order unsupported by evidence or contrary to the evidence, is arbitrary, and constitutes a denial of due process. In *Louis. & Nash. R. R. Co.* v. *Finn*, 235 U. S. 601, this Court said (p. 606):

> "* * * In cases arising under the Interstate Commerce Act, the provisions of which contemplate an investigation or inquiry conducted with some formality, followed by a written report and decision as the basis of the orders, it has been repeatedly held by

this court that an administrative order made indisputably contrary to the evidence, or without any evidence, must be deemed to be arbitrary, and therefore subject to be set aside. * * *"

In *R. R. Comm'n* v. *Pacific Gas Co.*, 302 U. S. 388, this Court, in discussing the principles of due process, speaking through Mr. Chief Justice Hughes, said (p. 303):

> "The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n*, 301 U. S. 292, 304, 305. There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the Commission *must act upon evidence* and not arbitrarily. * * * (Italics ours.)

Thus, under the decisions of this Court, the complaint alleges as a fact, admitted to be true upon a motion to dismiss, that the finding of the Board is unsupported by evidence and contrary to the evidence. This fact, if proven, would require that the finding be set aside as arbitrary and capricious and a denial of due process of law contrary to the Constitution.

III

The certfication of the bargaining representative by the Board threatens to deprive the petitioners of their right to bargain with their employer with respect to rates of pay, wages, hours of employment, and other conditions of employment, and their right to select representatives for the purposes of collective bargaining with respect to said subjects.

It is alleged in the complaint that the effect of the decisions and certifications of the Board, if they are not

vacated and set aside, will be unlawfully to deprive petitioners of the right to bargain with their employer with respect to rates of pay, etc. (R. 11).

The certification of the bargaining representative stands as a finding and adjudication by a powerful administrative body that the petitioners' employer can lawfully negotiate only with said bargaining representative concerning the rates of pay, wages, hours of employment and other conditions of employment of the petitioners, and that it cannot lawfully negotiate in regard to such matters with the petitioners or with any representative of their choosing.

It is no answer to say that such certification does not threaten the petitioners with the loss of those rights because it is not in fact an order directed to their employer. As stated by this Court in *A. F. of L.* v. *Labor Board*, 308 U. S. 401, at page 408:

> "* * * Administrative determinations which are not commands may for all practical purposes, determine rights as effectually as the judgment of a court, * * *."

When the same case was before the Court of Appeals for the District of Columbia, 103 F. (2d) 933, that court, speaking of the certification of the bargaining representative there under atack, said (p. 936):

> "It was definitive, adversary, binding, final, and in this case struck at the very roots of petitioner's union and destroyed its effectiveness in a large geographical area of the Nation."

So in the instant case, the certification the petitioners are asking be set aside is definitive, adversary, binding, and final, and strikes at the very roots of the petitioners'

right to bargain with their employer with respect to the terms and conditions of their employment.

In *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, this Court said of a determination of the Interstate Commerce Commission, which was not an "order" reviewable under the Urgent Deficiencies Act of October 22, 1913, "It has the effect, if validly made, of subjecting the respondent to the requirements of the Railway Labor Act." So in the instant case, the certification of a bargaining representative, if validly made, has the effect of subjecting the petitioners in their relations with their employer, and in their relations with the vault attendants of the Safe Deposit Company, to the requirements of the National Labor Relations Act.

See also *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125, 135-144.

Petitioners' rights are further threatened by the action of the designated bargaining representative in invoking the powers of the National War Labor Board to compel their employer to bargain with such representative (R. 36).

It is a fact of which this Court will take judicial notice (31 C. J. S. 602) that the National War Labor Board has repeatedly held that it is required to follow and support all certifications of bargaining agents by the National Labor Relations Board, and will order bargaining in compliance therewith so long as the same are in force and effect.

Aluminum Co. of America, 12 War Lab. Rep. 455;
Allis-Chalmers Mfg. Co., 11 War Lab. Rep. 518;
Automatic Transportation Co., 8 War Lab. Rep. 1;
Lebanon Steel Co., 2 War Lab. Rep. 283.

There is thus the concentrated force of two powerful administrative agencies directed to compelling the petitioners' employer to negotiate with a certified representative regarding the terms and conditions of their employment,

in total disregard of their rights to conduct such negotiations on their own behalf either individually or through representatives of their own choosing.

It is difficult to conceive of a greater threat to petitioners' rights.

IV

The petitioners' right to bargain with their employer with respect to rates of pay, wages, hours of employment and other conditions of employment, and the right to select representatives for such negotiations, are property rights protected by the Constitution of the United States.

This proposition is so fundamental and self-evident that it hardly needs citation of authority to support it. In *Coppage* v. *Kansas*, 236 U. S. 1, this Court said (p. 14):

> "* * * The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money."

In *Texas & N. O. R. Co.* v. *Ry. Clerks*, 281 U. S. 548, this Court affirmed the decree of the court below enjoining the railroad company from interfering with the right of certain of its employees to organize and designate representatives for the purpose of bargaining with it as their employer. It was argued that Section 20 of the Clayton

Act prohibited the injunction. On this point this Court said (p. 571):

> "A subordinate point is raised by the petitioner under Section 20 of the Clayton Act. This section provides, in substance, that no injunction shall be granted in any case growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right. This provision has been said to be declaratory of the existing law. *Duplex Printing Company* v. *Deering*, 254 U. S. 443, 470. It may be doubted whether Section 20 can be regarded as limiting the authority of the court to restrain the violation of an explicit provision of an act of Congress, where an injunction would otherwise be the proper remedy. It is not necessary to pass upon this point, for if it could be said that it was necessary in the present instance to show a property interest in the employees in order to justify the court in granting an injunction, we are of the opinion that there was such an interest, with respect to the selection of representatives to confer with the employer in relation to contracts of service, as satisfied the statutory requirement. * * *."

V

The petitioners are afforded no remedy under the National Labor Relations Act.

Referring to the petitioners, the Court of Appeals in its opinion stated (R. 44):

> "They make no showing of any special circumstances which make the review provided by statute an inadequate remedy for the matters set out in the complaint."

In this statement the Court of Appeals manifestly fell into error. The petitioners are powerless to bring about a judicial review of the validity of the certification by any

proceeding under the National Labor Relations Act. That Act affords them absolutely no remedy. Unless and until the certified bargaining representative files charges against petitioners' employer with the National Labor Relations Board, and that Board issues an order requiring their employer to bargain with that representative, petitioners cannot invoke the jurisdiction of a circuit court of appeals under the Act to pass upon the validity of the certification. *A. F. of L.* v. *Labor Board*, 308 U. S. 401.

A remedy which can be availed of only in the event that others take action which they are free to refrain from taking is not a remedy. Here the supposed remedy of petitioners is contingent upon their employer not yielding to administrative pressure brought to bear upon it to compel it to bargain with the certified representative, upon the certified representative petitioning the Board for an enforcement order and upon the Board's issuing such order. The only possibility that the petitioners may ever have a remedy thus depends upon a variety of contingencies entirely beyond their control. They are now absolutely without a remedy unless this Court will afford them one in this proceeding.

The failure of the National Labor Relations Act to afford the petitioners a remedy does not preclude them from resorting to the courts of the United States for the protection of their constitutional rights.

Article III, Section 2, of the Constitution provides in part:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, * * *."

Pursuant to this provision of the Constitution, Section 24 of the Judicial Code (28 U. S. C. A. Section 41 (1)) provides in part:

> "The District Court shall have original jurisdiction as follows: (1) of all suits of a civil nature at common law or in equity * * * where the matter in controversy (a) arises under the Constitution or laws of the United States."

Also (28 U. S. C. A. Section 41 (8)):

> "Of all suits and proceedings arising under any law regulating commerce."

This Court held in the case of *A. F. of L.* v. *Labor Board*, 308 U. S. 401, that the review provisions of the National Labor Relations Act were not applicable to a case such as is here presented. However, in that case this Court did not pass upon, but specifically reserved the question as to whether the validity of the Board's certification of a bargaining representative, when shown to inflict an injury for which the law, apart from the review provisions of the Act, affords a remedy, might not be the subject of an independent suit in equity.

It has been demonstrated that the certification in the instant case does inflict an injury on the petitioners in that it threatens to deprive them of their constitutional right to negotiate with their employer, either individually or through representatives of their own choosing, relative to their rates of pay, hours and conditions of employment. When, as has been demonstrated, such certification is arbitrary and capricious, without evidence to support it, and otherwise unlawful and void because in excess of the Board's jurisdiction, the petitioners present a case of which the Constitution expressly gives the courts of the United States jurisdiction, and of which original jurisdiction is,

by the Judiciary Act, lodged in the district courts of the United States.

If the District Court does not have jurisdiction in the instant case, then the petitioners are denied all right of resort to the courts, and such resort is likewise denied in all representative cases in which the employer for any reason recognizes the validity of the Board's certification and bargains pursuant thereto.

In *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, this Court held that the review provisions of the National Labor Relations Act afforded the employer ample opportunity for the protection of its constitutional rights. This Court said (p. 49):

> "* * * Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court. * * *"

It is manifest from the opinion of the Court that a provision of the Act purporting to deprive the employer of an opportunity for such review would have been held unconstitutional.

Even though the Act contains no provision by which the petitioners are specifically afforded an opportunity for such review, it does not and cannot follow that petitioners are not to be afforded such a review.

It cannot be said that silence on the part of Congress as to the right of employees in the position of petitioners to such a review indicates that Congress intended to attempt to deny them all judicial remedy. It is not within the power of Congress to do so. The power of the courts to extend judicial protection to constitutional rights is based squarely upon the Constitution itself. Congress cannot deprive the courts of the power to enforce the constitutional requirements of due process, nor make an administrative body, such as the Board, the exclusive judge of its own jurisdic-

tion. These principles are fully recognized in *Myers* v. *Bethlehem Corp. supra.* Congress can no more provide that the Board's determination of the question of whether employers or employees are engaged in interstate commerce shall not be subject to judicial review than it could provide that the constitutionality of its own acts shall not be open to such review. It cannot endow the Board, its creature, with any greater powers than it possesses itself.

This Court has repeatedly held that courts of the United States have jurisdiction to maintain an independent suit in equity to review administrative acts or findings where a statutory method of review has not been provided, if such review is necessary to protect constitutional rights.

Shields v. *Utah Idaho R. Co.*, 305 U. S. 177;
Utah Fuel Co. v. *Coal Comm'n.*, 306 U. S. 56;
Stark v. *Wickard*, 321 U. S. 288;
Crowell v. *Benson*, 285 U. S. 22.

It is respectfully submitted that Congress has not attempted to and cannot lawfully deprive the courts of the United States of the power to protect the constitutional rights of the petitioners shown by the allegations of their complaint to be infringed or greatly endangered by the certification of the Board.

VII

The finding of the Board that the Bank and the Safe Deposit Company and their respective employees involved in the Board's action, are engaged in interstate commerce and in activities affecting that commerce, involve a constitutional question as to which petitioners are entitled to a trial de novo.

As previously demonstrated, the allegations of the complaint raise a question as to the constitutional power of the

Board to entertain jurisdiction. As to such matters, neither the findings of the Board nor the evidence before the Board is controlling. The party challenging the power of the Board is entitled to a judicial trial of such an issue without regard to what occurred before the Board. The petitioners are therefore entitled to introduce evidence before the court which was not presented to the Board and they are in no way limted by the findings of the Board. This fundamental proposition of constitutional law is stated in Vom Baur's *Federal Administrative Law* (1942), Volume 1, page 256, as follows:

> "Questions of constitutional right and power raised by administrative action are none the less appropriate for the exercise of the judicial power, and must be tried *de novo*. Trial *de novo* has two outstanding characteristics, (1) the reviewing court must reach its own independent judgment on the facts and on the law, without being bound by the rule of administrative finality on the facts, and (2) additional evidence may be introduced, so that the case need not be decided on the administrative record alone.
>
> "Courts must decide *de novo* * * * whether interstate commerce is involved, or affected to an illegal extent, * * *."

The case of *Crowell* v. *Benson*, 285 U. S. 22, clearly and fully states the reasons for this fundamental principle of constitutional law. That suit was an action in the District Court to enjoin the enforcement of an award in favor of one Knudson and against one Benson, his alleged employer, made by a Deputy Commissioner of the United States Employees Compensation Commission under the Federal Longshoremens' and Harbor Workers' Compensation Act. The District Court denied a motion to dismiss and granted a hearing *de novo* upon the facts and the law. An issue of fact as to the employment of Knudson by Benson was

raised by answers filed. A trial was had and the court found that Knudson was not in Benson's employment and restrained the enforcement of the award. The decree was affirmed by the Circuit Court of Appeals and by this Court. This Court, after pointing out that Congress might limit the scope of judicial review as to findings of fact by the Commission as to the extent of an employee's injuries, and other facts not involving the Commission's jurisdiction, speaking through Mr. Justice Hughes, said, page 54, *et seq.*:

> "(3) What has been said thus far relates to the determination of claims of employees within the purview of the Act. A different question is presented where the determinations of fact are *fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the operation of the statutory scheme.* These fundamental requirements are that the injury occur upon the navigable waters of the United States and that the relation of master and servant exist." (Italics ours.)

And at page 56, *et seq.*:

> "In relation to these basic facts, the question is not the ordinary one as to the proprietary of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. *It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions.* It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency —in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper

province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress *could completely oust the courts of all determinations of fact* by vesting the authority to make them with finality in its own intrumentalities or in the Executive Department. *That would be to sap the judicial power as it exists under the federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend,* as not infrequently they do depend, *upon the facts,* and finality as to facts becomes in effect finality in law." (Italics ours.)

And again on page 60:

> "In the present instance, the argument that the Congress has constituted the deputy commissioner a fact-finding tribunal is unavailing, as *the contention makes the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved.*" (Italics ours.)

And at page 63, *et seq.*:

> "Assuming that the Federal court may determine for itself the existence of these fundamental or jurisdictional facts, we come to the question,—Upon what record is the determination to be made? * * * As the question is one of the constitutional authority of the deputy commissioner as an adimistrative agency, *the court is under no obligation to give weight to his proceedings pending the determination of that question.* If the court finds that the facts existed which gave the deputy commissioner jurisdiction to pass upon the claim for compensation, the injunction will be denied in so far as these fundamental questions are concerned; if, on the contrary, the court is satis-

fied that the deputy commissioner had no jurisdiction of the proceedings before him, that determination will deprive them of their effectiveness for any purpose. *We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it.*" (Italics ours.)

To the same effect are *Oho Valley Co.* v. *Ben Avon Borough*, 253 U. S. 287, 289, and *Prendergast* v. *N. Y. Tel. Co.*, 262 U. S. 43, 50.

It is manifest, as is pointed out by this Court, that any other rule would sap or destroy the judicial power of the courts in the enforcement of constitutional rights and lead to a government of bureaucratic character, alien to our constitutional system and destructive of our individual liberties as protected by the Constitution.

The Board's jurisdiction to make the certification and decision was conditioned upon the Bank's and the Safe Deposit Company's and their respecitve employees' being engaged in interstate commerce or in activities closely and directly affecting interstate commerce. If any of them are not so engaged, the Board's decision and certification are invalid and void because it had no constitutional power to make them.

It is respectfully submitted, not only that upon the admitted allegations of the complaint the Court is required to assume that the Board's findings are not supported by evidence, but also that with respect to the jurisdiction of the Board the Court is not concerned with the Board's findings or the record before the Board, but is under a duty to permit a trial *de novo* of that matter and to reach

an independent judgment on the facts which may be presented at the trial.

VIII

The cases cited by the court below as authority for its action in affirming the judgment dismissing the complaint do not support such action.

The Court of Appeals in its opinion stated (R. 44):

> "The judgment of the court below will be affirmed on the authority of *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, at 411-412 (1940)."

As this Court knows, all that was decided in that case was that the validity of the certification of a bargaining representative by the National Labor Relations Board cannot be reviewed by the procedure prescribed in the National Labor Relations Act except as incidental to review of an order restraining an unfair labor practice. This Court expressly left open the question as to whether the lawfulness of the certification might be subject to review by an independent suit in equity. Certainly that case does sustain the Court's ruling.

The court below also cites *Switchmen's Union* v. *Board*, 320 U. S. 297, as having some bearing on its decision. In that case the National Mediation Board's determination as to the proper participants in an election of a collective bargaining representative and its certification of such a representative pursuant to an election was held not subject to review by a suit in a federal district court. It its opinion this Court was careful to point out that is was dealing only with rights created by Congress. Thus it said (p. 300):

> "* * * Congress for reasons of its own decided upon the method for the protection of the 'right' which

> it created. * * * All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. * * *"

In the instant case petitioners are not asserting any rights created by Congress. They are not asserting any rights to bind others by the selection of a bargaining representative under the National Labor Relations Act. They are claiming only the right to bargain for themselves, either individually or through a representative in which all freely join in choosing, which is a valuable property right protected by constitutional guaranties.

There is nothing in the *Switchmen's case* or the related cases to warrant the view that this Court held that Congress has the right to take from courts of the United States the power, expressly given by the Constitution, to protect the constitutional rights of individuals from "the assertion of unauthorized administrative power." *Stark* v. *Wickard,* 321 U. S. 288, 310.

Lastly, the court cites *Employers Group, etc.* v. *National War Labor Board,* 143 F. (2d) 145. In that case it is stated that an order of the National War Labor Board is not enforceable by judicial proceedings, that in some instances a failure to comply with the order of that Board has resulted in concerns being taken over by presidential order, but that the powers of the President to take possession of plants and facilities is not dependent upon the order of the Board.

The fact that an order of the War Labor Board may not be enforced by judicial procedure does not deprive it of great compulsive force. Nor does the fact that the power of the President to take over the property of a concern is not dependent upon the order of the Board make such order less compulsive in effect if a failure to obey the order is the occasion for calling the presidential power into play.

Conclusion

It is respectfully represented that the petitioners' right to bargain with their employer with respect to the terms and conditions of their employment it gravely threatened by the certification of a bargaining representative by the National Labor Relations Board which, on the allegations of the complaint, was the result of arbitrary and capricious action, unsupported by and contrary to the evidence, and in excess of the Board's jurisdiction.

The Constitution has confided to the courts of the United States the duty of protecting the constitutional rights of every individual, however humble, whenever those rights are threatened, from whatever source that threat may arise. It is vitally important that the average citizen retain his faith in the will and ability of our courts to protect those rights from the assertion of unauthorized administrative power.

It is respectfully submitted that the decision of the Court of Appeals for the District of Columbia has denied to the petitioners resort to the courts of the United States for the protection of their constitutional rights, and for that reason said decision should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 884

LYLE E. REILLY, ET AL., PETITIONERS

v.

HARRY A. MILLIS, INDIVIDUALLY AND AS CHAIRMAN OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Columbia (R. 39–41) is reported in 52 F. Supp. 172. The opinion of the United States Court of Appeals for the District of Columbia (R. 44) is reported in 144 F. (2d) 259. The decision and direction of election of the National Labor Relations Board (R. 15–25) is reported in 50 N. L. R. B. 516. The supplemental decision and certification of representatives of the National Labor Relations Board (R. 25–28) is reported in 51 N. L. R. B. 715.

JURISDICTION

The judgment of the court below (R. 45) was entered on July 10, 1944. A petition for rehearing, filed by petitioners on August 11, 1944 (*ibid.*), was denied on September 23, 1944 (R. 46). On December 2, 1944, petitioners' time within which to file a petition for certiorari was extended until February 1, 1945, by an order of the Chief Justice of the United States. The petition for a writ of certiorari was filed on January 29, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*) are set forth in the Appendix, *infra,* pp. 16–19.

QUESTIONS PRESENTED

1. Whether petitioners' complaint alleges facts showing that the action of the National Labor Relations Board, under Section 9 (c) of the National Labor Relations Act, in certifying a labor union as the collective bargaining representative of a designated unit of employees, including petitioners, threatens them with any immediate and irreparable injury cognizable in a suit in equity.

2. A further question urged by petitioners, but which we think is not reached, is whether the

district courts of the United States have jurisdiction to set aside such a certification upon allegations sufficient to show that the certification was beyond the Board's power under the Act and the Commerce Clause, and that the unit found by the Board improperly included petitioners, contrary to the Act and the Due Process Clause of the Fifth Amendment.

STATEMENT

The facts as alleged in the complaint (R. 1–13) are as follows: Petitioners are twenty protection force employees of City National Bank & Trust Company of Chicago, herein called the Bank (R. 2–3). The Bank is engaged in commercial savings and loan activities, personal and corporate trust services, installment financing for automobile dealers, farm banking, and investment services. Located in Chicago, Illinois, the Bank is the forty-sixth largest commercial bank in the United States. As of December 31, 1942, its total assets amounted to $232,258,453.56, and $101,770,611.28 of such assets represented investments in securities of the United States Government. During the month of December 1942, transit items forwarded to banks outside the State of Illinois aggregated $105,000,000. From July 1, 1942, to December 31, 1942, the Bank issued foreign letters of credit and travelers' checks valued at $106,350, and also provided foreign exchange for its customers valued at $205,553. The Bank maintains deposit

accounts in other banks located in fifteen principal cities in ten states throughout the United States. Prior to the war, it maintained accounts in various other banks located in foreign cities. (R. 3–4.)

City National Safe Deposit Company, herein called the Safe Deposit Company, an Illinois corporation, is engaged in the business of renting safety deposit space to the public. It is a tenant of the Bank and the premises it occupies are within the physical confines of the bank building. All of the stock of the Safe Deposit Company is owned by the Bank. Each of its officers, with but one exception, is also an officer of the Bank. As of January 31, 1943, the Safe Deposit Company had 8,227 safety deposit boxes under lease, of which 174 were leased to non-residents of Illinois. Approximately one-half of the lessees of safety deposit space are also customers of the Bank. (R. 4.)

The protection force of the Bank consists of thirty-five armed guards who include police guards, police messenger guards, and night watchmen (R. 4). The police guards guard the premises and direct customers seeking information; the police messenger guards are plainclothesmen who protect messengers traveling for Bank purposes in the City of Chicago; the night watchmen protect the premises of the Bank at night, turn off lights, and watch for fires. All are under the immediate supervision of the chief of the day police of the Bank. (R. 4–5.) The Safe Deposit

Company employs three armed guards and five vault attendants who are deputized to carry arms. They guard the premises and handle access slips from safe deposit box lessees who request admission to the vaults and, in addition, withdraw and replace boxes for lessees. They are under the immediate supervision of the manager of the Safe Deposit Company. (R. 5.)

On March 26, 1943, Protective Service Employees' Union of Chicago, Local 240, affiliated with Building Service Employees' International Union (A. F. of L.), herein called the Union, filed a petition requesting the National Labor Relations Board to certify it pursuant to Section 9 (c) of the Act, as the collective bargaining representative of the protection employees of the Bank, among whom are petitioners, and the armed guards and vault attendants of the Safe Deposit Company (R. 5). The Bank and the Safe Deposit Company opposed the Union's petition on the grounds that the Board was without jurisdiction over the companies and that the requested unit would not be appropriate. A hearing was held in Chicago, Illinois, before a trial examiner, and the Bank and the Safe Deposit Company each appeared by counsel and offered evidence in opposition to the petition for investigation and certification. (R. 6.) [1]

[1] In accordance with the Board's usual practice, the individual employees were not made parties to the proceeding or served with notice of hearing.

On June 15, 1943, the Board made and entered its decision and direction of election (R. 15–25), after finding that the Bank and Safe Deposit Company may be considered as a single integrated enterprise; that they are engaged in commerce and their operations affect commerce within the meaning of the Act; and that all members of the day police, night force, and deputies employed by the Bank, and the vault attendants employed by the Safe Deposit Company, with certain exceptions, constitute an appropriate unit (R. 6–7).[2] Consequently, the Board directed an election which was held on July 10, 1943 (R. 7). The Board thereafter certified that there were forty-two eligible voters; that forty-four ballots were cast, of which four were challenged; that of the unchallenged ballots, twenty-three were cast for the Union and seventeen against the Union (R. 8). The Bank and Safe Deposit Company filed objections to the conduct of the ballot and the election report, the Bank alleging that less than a majority of its protection employees had voted in favor of being represented by the Union, and that but for the inclusion in the unit of employees of the Safe Deposit Company, no majority in favor of the

[2] The Board found that both groups of employees are eligible for membership in the Union, that, in general, their working conditions, standards of pay, and other incidents of employment are similar, and that for these reasons and because the Bank and the Safe Deposit Company constitute, in effect, a single employer, there was no reason why more than one unit should be established (R. 21–23).

Union would have resulted at the election (R. 8). The Board found these objections to be without merit (R. 27–28), and on July 23, 1943, certified the Union as the statutory bargaining representative (R. 8–9).

On September 17, 1943, petitioners filed a complaint in the United States District Court for the District of Columbia against the members of the Board individually and in their official capacities, praying for a mandatory injunction to set aside and expunge from the records of the Board its decisions, direction of election, and certification (R. 12–13); this on the theory that the action of the Board was in contravention of the National Labor Relations Act and the Fifth Amendment to the Constitution (R. 9–10). In addition to stating the facts outlined above, the petitioners alleged that at the time of the election and at the present time it was and is the desire of a majority of the protective employees of the Bank that they not be represented by the Union (R. 9). They further alleged that all twenty petitioners cast their ballots and voted against the Union,[3] (R. 9). Petitioners also asserted that the certification unlawfully deprived them of valuable property rights, namely, of rights to bargain with their employer individually or through a representative other than the Union (R. 9, 11–12).

[3] The election conducted by the Board was, of course, secret and the Board has no information respecting the manner in which any of the petitioners marked their ballots. The

Affidavits filed in support of a motion for a preliminary injunction (R. 28–36) stated in substance that following the certification, the Bank replied to the Union's request for collective bargaining by stating that since it believed that the Board erroneously assumed jurisdiction and that the unit fixed by the Board was inappropriate, it was "taking steps to secure a review of the Board's action" (R. 34). These affidavits also stated that the Union thereafter applied to the United States Conciliation Service "to persuade" the Bank to bargain with the Union (*ibid.*), and that on September 14, 1943, the Conciliation Service certified the dispute between the Bank and the Union to the National War Labor Board (R. 63).[4]

The members of the National Labor Relations Board moved to dismiss the complaint on the

Board counted only seventeen votes against the Union, and if all twenty petitioners did in fact vote against the Union, at least three of their ballots are among the four challenged and unopened.

[4] There is no allegation concerning the proceedings before the National War Labor Board, but it appears from the latter's records that it issued a directive order on January 22, 1945, that the Companies recognize the Union "in conformity with the National Labor Relations Board certification dated July 26, 1943," but that "If the Employer's position that it is without the jurisdiction of the National Labor Relations Board is sustained by the courts, either party may request this Board to terminate or modify its order." *Matter of City National Bank and Trust Company of Chicago*, Case No. 111–3866–D, before the National War Labor Board. The directive order also contains provisions as to the terms and conditions of employment which "shall goven the relations" between the Bank and the Union (*ibid.*).

grounds, *inter alia,* that the district court was without jurisdiction of the subject matter of the complaint; that, in any event, the complaint on its face fails to state a cause of action entitling petitioners to any relief; that it fails to show that they are threatened with or are in danger of suffering any irreparable or immediate injury as a result of the certification or that they have exhausted their administrative remedies; that the complaint fails to show that petitioners do not have an adequate remedy under the Act; and that there was an absence of indispensable parties, namely, the Companies and the Union (R. 36–37). On October 4, 1943, the district court delivered its opinion, holding that it had jurisdiction to grant the relief sought, but that the motion to dismiss the complaint should be granted because on the face of the record before the court, it appeared that the Board's unit determination and its finding that the Companies were subject to its jurisdiction were supported by substantial evidence (R. 39–40). On October 26, 1943, the district court entered its order denying petitioners' motion for a preliminary injunction and granting the motion to dismiss the complaint (R. 41).

Thereafter, petitioners appealed from the judgment of the district court to the court below (R. 42). On July 10, 1944, upon consideration of the appeal, the court below issued its *per curiam* opinion affirming the judgment of the district court (R. 44), on the grounds (1) that the Na-

tional Labor Relations Act provided no review of the certification until the Board had issued an order based on the facts certified, and (2) that the complaint did not allege a cause of action within the equity jurisdiction of the court because it did not show that petitioners were threatened with irreparable injury as a result of the certification or that the review procedures of the Act were inadequate (R. 44).

ARGUMENT

Whether, on complaint of a union in an independent suit in equity, the district courts of the United States have jurisdiction to review a Board certification, is a question which this Court now has before it in *Inland Empire District Council* v. *Millis,* No. 613. This suit by individual employees to set aside a Board certification involves a similar issue, but one which the court below did not pass upon. We call to this Court's attention certain considerations which probably led the court below not to pass upon this issue and which may lead to the conclusion that on this record there is no warrant for further review. Cf. *Moor* v. *Texas & N. O. R. Co.,* 297 U. S. 101.

1. The court below held that the "complaint on its face does not show that plaintiffs are threatened with irreparable injury as a consequence of the certification" and that petitioners "make no showing of any special circumstances which make the review provided by statute an inadequate remedy for the matters set out in their com-

plaint" (R. 44). This is an accurate appraisal of petitioners' complaint, and we think, therefore, that there is no need to decide whether, if such a showing were made, the district court would have jurisdiction, or whether the review provided by the National Labor Relations Act in the circuit courts of appeals is exclusive.

While the court below dealt with petitioners' right to equitable relief rather summarily, it probably was motivated by some of the following considerations. The complaint does not allege that the Companies have honored the certification by bargaining with the Union. In fact the affidavit filed by one of the petitioners in the district court indicates that on August 9, 1943, the Bank refused to bargain with the Union and informed it that the Bank believed that the Board was in error in taking jurisdiction of the representation petition, that the unit designated was not appropriate, and that steps were being taken to secure a review of the Board's action (R. 34).[5] There

[5] While the record is silent on this point, it may fairly be assumed that until January 22, 1945, at which time the National War Labor Board directed the Companies to enter into a collective bargaining agreement with the Union (*supra*, note 4, p. 8), the Companies had failed to bargain. It should be noted that such a directive gives rise to no judicially enforceable obligation upon the employer to bargain. *Employers Group of Motor Freight Carriers* v. *National War Labor Board*, 143 F. 2d 145 (App. D. C.), certiorari denied, No. 356, this Term; *National War Labor Board* v. *Montgomery Ward & Co., Inc.*, 144 F. 2d 528 (App. D. C.), certiorari denied, No. 538, this Term.

is thus no showing that petitioners' relationship with their employer has been altered in any way by reason of the certification.[6] Compare *Inland Empire District Council* v. *Millis,* No. 613, this Term (allegation that the certification resulted in termination of a valuable contract which the petitioners had with the employer); *Tunstall* v. *Brotherhood of Locomotive Firemen,* No. 37, this Term, and *Steele* v. *Louisville & Nashville Railroad Company,* No. 45, this Term (allegations that the certified union had entered into an agreement with the employer under which the petitioning employee was demoted or deprived of his job).

So long as the Companies do not bargain with the Union, and so far as the record is informative they have not bargained, the petitioners have not been prejudiced. And if an order to honor the certification and bargain is made by the Board, petitioners will then have the opportunity to be heard on their objections to the certification on review proceedings, initiated by them if need be,

[6] A certification of the National Labor Relations Board is in no sense itself a command and imposes no greater obligation than that to which the statute subjects the employer. *Switchmen's Union of North America* v. *National Mediation Board,* 320 U. S. 297, 304. But cf. *American Federation of Labor* v. *National Labor Relations Board,* 308 U. S. 401, 408. The certification is basically a determination by the Board that a particular union represents a majority of the employees in the unit which the Board has found appropriate. The obligation to bargain on request flows from the statute.

in the circuit courts of appeals. Cf. *Jacobsen* v. *National Labor Relations Board,* 113 F. 2d 728 (C. C. A. 3).[7]

2. Moreover, petitioners did not exhaust their remedies before the Board. Petitioners participated in the balloting, and at least at that time had notice of the pendency of a representation proceeding (compare R. 9, par. 20). Nevertheless, at no time did they seek to intervene. Contrary to petitioners' assertion (R. 9), there is no settled policy of the Board not to permit intervention in circumstances such as those presented here. Intervention has been permitted where appropriate. *Matter of Evening News Association,* 42 N. L. R. B. 763, 764, 765–766; see also *Matter of R. J. Reynolds Tobacco Co.,* 52 N. L. R. B. 1311, 1312, 1320, fn. 13. While petitioners' participation in the representation proceedings may not have resulted in a different decision, it is well settled that a suitor must exhaust his administrative remedies "even though he may believe that his search will be futile." *Mallory Coal Co.* v. *National Bituminous Coal Com'n,* 99 F. 2d 399, 407 (App. D. C.). See also *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, 50 and cases cited therein.

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[7] Under Section 10 (f) of the Act, any "person aggrieved" by a final order of the Board may obtain review of the order in an appropriate circuit court of appeals.

3. The ruling of the district court (R. 40) that the certification was validly entered was clearly correct. The facts stated in the complaint afford sufficient evidentiary basis for the Board's finding that the Companies are engaged in commerce and that their operations affect commerce within the meaning of the Act (Cf. *Polish National Alliance* v. *National Labor Relations Board,* 322 U. S. 643; *National Labor Relations Board* v. *Bank of America Ass'n,* 130 F. 2d 624 (C. C. A. 9), certiorari denied, 318 U. S. 791, 792), and its further finding that a unit made up of both the protective employees of the Bank and of the Safe Deposit Company is appropriate. Cf. *National Labor Relations Board* v. *Clarksburg Publishing Co.,* 120 F. 2d 976, 980 (C. C. A. 4). This consideration alone may well be deemed sufficient reason for the denial of the petition. The decision in the *Inland Empire* case will probably dispose of any basic jurisdictional problem that is lurking in this record. And petitioners in this case are certainly not prejudiced by the dismissal of their complaint for lack of equity when, in any event, their complaint states facts more than adequate to show that the certification was within the Board's power. Cf. *Brooks* v. *Dewar,* 313 U. S. 354.

CONCLUSION

For the reasons set forth above, we cannot acquiesce in the petition for a writ of certiorari.

Respectfully submitted.

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MARCH 1945.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

* * * * *

SEC. 8. It shall be an unfair labor practice for an employer—

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the repre-

sentatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, * * *.

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor

practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. * * * Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

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